Supreme Court, U.S.
FILED
OCT 23 1996
CLERK

No. 96-517

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

WILLIAM R. FRY, ANTHONY J. MARRA, SIDNEY MISHKIN, THOMAS J. DWYER, KATHLEEN B. DWYER, PROGRESSIVE UNITED CORPORATION, and MERIDIAN STRATEGIC INVESTMENTS, L.P., both individually and as class representatives,

Petitioners,

v.

UAL CORPORATION,
a Delaware corporation,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICUS CURIAE* TEAMSTERS UNION NO. 142 PENSION TRUST FUND IN SUPPORT OF PETITIONERS

MICHAEL C. GREENFIELD
(Counsel of Record)
ASHER, GITTLER, GREENFIELD, COHEN & D'ALBA, LTD.
125 South Wacker Drive
Suite 1100
Chicago, Illinois 60606
(312) 263-1500
Attorneys for Amicus Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

5 pp

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-517

WILLIAM R. FRY, ANTHONY J. MARRA, SIDNEY MISHKIN, THOMAS J. DWYER, KATHLEEN B. DWYER, PROGRESSIVE UNITED CORPORATION, and MERIDIAN STRATEGIC INVESTMENTS, L.P., both individually and as class representatives,

Petitioners,

v.

UAL CORPORATION,
a Delaware corporation,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF OF *AMICUS CURIAE* TEAMSTERS UNION NO. 142 PENSION TRUST FUND IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST

Amicus Curiae, Teamsters Union No. 142 Pension Trust Fund, is a collectively bargained employee pension benefit plan existing pursuant to Sections 302(c)(5) *et*

seq., 29 U.S.C. §§ 186(c)(5) *et seq.*, of the Labor-Management Relations Act, 29 U.S.C. §§ 141 *et seq.*, and operated in accordance with the Employee Retirement Income Security Act of 1974, as amended (ERISA), 29 U.S.C. §§ 1001 *et seq.* The fund is administered jointly by management and union trustees. It holds in excess of 100 million dollars in the securities of publicly traded companies and has more than six thousand participants. The fund approaches the problems raised in the Certiorari Petition in this case from the broad perspective of a pension fund which owns and trades public company securities on a broad scale on behalf of a great many people.[1]

STATEMENT OF THE CASE

Amicus Curiae adopts the statement of the case set forth in Petitioners' Petition For Certiorari.

SUMMARY OF THE ARGUMENT

The Seventh Circuit's ruling that an issuer need not disclose the opposition of its dominant shareholder to an important corporate announcement unless that opposition would show that the announced plan was "inconceivable" deprives investors of important information which could show them that the announced plan was unlikely—information we consider material to our investment decisions and which is needed to prevent investors from being misled.

ARGUMENT

In addressing the disclosure of the opposition of a dominant shareholder, the Seventh Circuit has rejected the Supreme Court's test for the disclosure of material facts—that omitted information is material and must be disclosed during an important corporate announcement

---

[1] *Amicus Curiae* sought and received the permission of Petitioners and Respondent to file this brief. The letters granting that permission are filed contemporaneously with this document.

if there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information. . . . *Basic, Inc. v. Levinson*, 485 U.S. 224, 231-232 (1988) citing *TSC Industries, Inc. v. Northway, Inc.* 426 U.S. 438, 449, 448 (1976).

The Supreme Court has never specifically addressed a corporation's duty to disclose the opposition of a dominant shareholder to its announced plan. If the Supreme Court's precedent on materiality is to be abandoned and a new rule is to be applied to major shareholder opposition it should be decided by the Supreme Court. This is an important area because in recent years powerful shareholders have become much more active in pressing management for changes in corporate policy. And there is often a great temptation for management to try to prevent this opposition from becoming public knowledge. If management is free to conceal the opposition of a dominant shareholder during the announcement of its plans then it is free to mislead investors about the likelihood of its plan being implemented.

According to the Seventh Circuit, as long as the dominant shareholder's opposition does not render the announcement "inconceivable" an issuer is free to cause investors to believe that its announcement is a virtual certainty—irrespective of how untrue that really was. Pet. App. 16A, 17A.[2] Here for example investors were led to believe that the announced dividend distribution was highly likely when, in fact, it was highly unlikely because the corporation did not reveal the fact that the shareholder with the power to control the decision was against it. This ruling is inconsistent with the full disclosure regime contemplated by the securities laws (*Basic*, 485 U.S. at 234) and serves no purpose other than to permit the promulgation of misleading statements.

---

[2] These references are to the Appendix submitted with the Petition For Certiorari.

Furthermore the Seventh Circuit's ruling is inconsistent with the prohibition against material omissions found in the federal securities laws governing misrepresentations. All of these laws make it actionable for a company to make a technically true statement while omitting to state a material fact necessary to make that statement, not materially misleading. *See* Rule 10b-5, 17 C.F.R. § 240.10b-5 (1995) and Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1994); Section 14 of the Securities and Exchange Act of 1934, 15 U.S.C. § 78n (1994); and Sections 11(a) and 12(a)(2) of the Securities Act of 1933, 15 U.S.C. §§ 77k(a) & 77k(a)(2) (1994). The Seventh Circuit's ruling that there is no disclosure obligation unless the omitted fact completely negates the announcement or as long as the omitted fact did not show the announcement was "inconceivable" or a "complete non-starter" (Pet. App. 16A, 17A) effectively eliminates the material omission requirement from the federal securities laws.

CONCLUSION

For the foregoing reasons *Amicus Curiae*, Teamsters Union No. 142 Pension Trust Fund, requests that the Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit be granted and that the Supreme Court either reverse summarily or grant a plenary review.

Respectfully submitted,

MICHAEL C. GREENFIELD
(Counsel of Record)
ASHER, GITTLER, GREENFIELD,
COHEN & D'ALBA, LTD.
125 South Wacker Drive
Suite 1100
Chicago, Illinois 60606
(312) 263-1500
Attorneys for Amicus Curiae